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IN THE

Supreme Court of the United States

CHICAGO FIRE FIGHTERS UNION LOCAL NO. 2, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RELPY BRIEF

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ARGUMENT

1. Respondent apparently considers its brief in opposition to be a cathartic exercise, because it devotes nearly half of its brief to *its own ignominious history of intentional discrimination*. Since the compelling interest prong of strict scrutiny is not at issue, Petition at pp. 3-4, Respondent's decision to set out that history "at some length," Brf. in Opp. at p. 5, means that its statement of the case is neither "concise" nor "material." S. Ct. Rules 15.3, 24.1(g). Moreover, the persistence of "racial policies" that caused the Chicago Fire Department to be "uncongenial" to blacks and Hispanics throughout Fire Commissioner Robert Quinn's 20 year tenure, Pet. App. 189a—Commissioner Quinn's reign came to an end in 1977, shortly after the death of his boyhood

friend and sponsor, Mayor Richard J. Daley, Pet. App 22a, Tr. 130, 2505-06—provide no justification, based on this Court's decisions, for promotional preferences enduring a quarter of a century later. *U.S. v. Paradise*, 480 U.S. 149, 178 (1987) (a race conscious remedy must be "ephemeral" in its "duration"); *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (prohibiting race conscious remedies that are "ageless in their reach into the past, and timeless in their ability to affect the future").

2. As to facts highly probative of the narrow tailoring issue Respondent stands mute. Hence, Respondent does not take issue with the fact that since 1985 all promotional exams administered in the CFD, including the six that are the subject of the Petition, have satisfied validation requirements of the uniform guidelines. Pet. App. 17a, 19a, 22a.[1] Nor does Respondent quarrel with the fact that it has favored African-Americans and Hispanics in awarding promotions continuously since 1987—and by the time of trial in 1997, Respondent had awarded 21% (224/1048) of all promotions in line with the race conscious preferences dictated by its affirmative action policy. Pet. App. 22a, 29a-34a, 43a-45a,

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[1] Respondent's assertion that promotional preferences only were awarded to minorities whose test scores "were within the same statistical range as the scores of nonminorities," Brf. in Opp. at pp. 2-5, is a non sequitur. Respondent's own experts admitted that even with score differentials as small as .01 (e.g., 90 compared to 89.99)—let alone the 12 point statistical range for scores on the 1994 engineer exam, Tr. 1672, 1677, 3490—there is a greater than 50% probability that the person with that higher test score will have higher job performance, making the higher score the "optical" predictor of performance. Tr. 1451, 1549, 1629, 1631, 1691, 3340, 3455; PX 51 at p. 32. The grouping or "banding" of test scores within a statistical range has absolutely no predictive value as far as job performance is concerned. *See,* 29 CFR §1607.14C(9) ("If . . . a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels."); *accord, Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

60a-62a, 73a-76a, 107a-109a. On the other hand, Respondent frankly admits that by 1987, when it began to take race and ethnicity into account in awarding promotions, "discriminatory barriers" to hiring had been "significantly reduced, *if not eliminated*." Brf. in Opp. at p. 10; italics added.[2] This concession, by itself, demonstrates that Respondent's preferential promotion policy is out-of-sync with *City of Richmond v. J.A. Croson,* 488 U.S. 469, 509 (1989), where Justice O'Connor, in her plurality opinion in Part V, opined that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary *to break down* patterns of deliberate exclusion." Italics added.

3. Respondent, however, considers its dutiful obedience to race neutral hiring and promotional practices, for 20 and 10 years, respectively (at the time of trial), to be of little import in gauging the duration of its policy of awarding preferential promotions to minorities. Brf. in Opp. at pp. 14-15. According to Respondent, the decisions of this Court lend no support whatsoever to Petitioner's argument that promotional preferences "endure only until a validated examination process was in place." Brf. in Opp. at p. 15. Petitioner's argument in that regard is, of course, derived from *U.S. v. Paradise*, where the Court upheld a 50% promotional quota, because of its "ephemeral" quality, *to wit*, the quota "*endures only until the Department comes up with a procedure that*

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[2] Those barriers fell when the hiring process became subject to the consent decrees that Respondent and DOJ entered into in the mid to late 1970s. Petition, ¶¶ 1, 5, at pp. 6-8; Pet. App. 23a. So Respondent's focus just on the minority hiring rate from 1985 onward, Brf. in Opp. at p. 10, as evidence of the elimination of hiring discrimination in the CFD, is far too narrow. While minorities accounted for 41.25% of the 1400 new hires in the 8 year period between 1985-92, minorities were similarly represented during the first 8 years of hiring under the consent decrees (1977-84) when 40% of the 1650 new hires were minorities. DX 17-30. And once hired minority firefighters and white firefighters had nearly identical attrition rates. Tr. 1154, 1215, 2937, 4609.

does not have a discriminatory impact on blacks . . ." 480 U.S. at 178; italics added. Respondent cannot bring itself to address what the Court in *Paradise* described as the "[m]ost significant[]" aspect of the race conscious remedy, i.e., its impermanence. *Id.*

4. Instead, and insidiously at that, Respondent cites *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), in support of its continuing use of racial and ethnic preferences, Brf. in Opp. at p. 15, basing that argument on the following quotation:

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. 515 U.S. at 237.

Respondent, however, chooses to ignore the next two sentences in Justice O'Connor's majority opinion in *Adarand*, which dispels any notion that the cited quotation is an endorsement of minority preferences, let alone preferences that endure without any foreseeable end in sight:

> As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. See *United States v. Paradise*, 480 U.S., at 167 (plurality opinion of Brennan, J.); *id.*, at 190 (STEVENS, J., concurring in judgment); *id.*, at 196 (O'CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases. *Id.*

5. The "race-based remedy" that "*every* Justice of this Court agreed" upon in *Paradise*, was certainly not promo-

tional preferences. While the plurality in *Paradise*—Justices Brennan, Marshall, Blackmun, and Powell—approved of the 50% promotional quota, and then only until a non-discriminatory promotional exam was in place, the dissent—Justice O'Connor, joined by the Chief Justice, and Justices White and Scalia—rejected those preferences outright. 480 U.S at 178, 196-200. What makes Respondent's brief in opposition so disingenuous is that it eschews any reference to the particular species of affirmative action—racial and ethnic preferences—that has defined the CFD promotional process for nearly 15 years now, and substitutes in its place the generic term "affirmative action."[3]

6. In the end, however, Respondent's attempt to blur the fundamental differences between affirmative action that expands opportunities and affirmative action that relies on preferences, is too cute by half. This is demonstrated by Respondent's contention that Justice Scalia alone "has endorsed [Petitioners'] view that the government may *never*

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[3] "Affirmative action," a term that originated in Executive Order 11206 of 1964, requires federal contractors to take "positive steps . . . to ensure equal employment for traditionally disadvantaged groups." Office of Federal Contract Compliance EO 11246 Fact Sheet: <www.dol.gov/dol/esa/public regs/compliance/ofccp/fs11246.htm>. EO 11206 does not allow a contractor "to extend a preference" based on race, ethnicity, etc. 41 CFR § 60.2-16(e)(2). This type of affirmative action looks to the expansion of opportunities through, *inter alia*, outreach programs to widen the pool of minority applicants, training programs to upgrade the skills of workers, or, as Justice O'Connor's opined in *Paradise,* the development of a non-discriminatory promotion procedure. 480 U.S. at 200. The other type of affirmative action policy—manifested by Respondent's program that reserves promotions to minorities by an amount that is "20% over the African-American and Hispanic composition in the rank eligible for promotion," e.g., DX 5-2 at p. 1—is result oriented and predicated on fixed outcomes. In light of the Seventh Circuit' decision, that outcome will be attained only when the CFD workforce reflects the census based proportional hire model advocated by the City's expert. Pet. App. 3a-6a.

use affirmative action to redress the continuing effects of prior discrimination. *See*, *Adarand*, 515 U.S. at 239 . . ." Brf. in Opp. at p. 16, n. 3. Respondent can hardly be oblivious to the fact that it was Justice Scalia's first Term as a member of the Court when *Paradise* was decided. Hence, Justice Scalia was included in Justice O'Connor's observation that "every Justice of this Court agreed [in *Paradise*] that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy." *Adarand*, 515 U.S. at 237. As Justice Scalia indicates in his concurrence in *Adarand*, it is the "concept of racial entitlement"—a/k/a racial preferences—that is constitutionally objectionable *at any time*, 515 U.S at 239, a view that is shared by Justice Thomas as well. *Adarand*, 515 U.S. at 240-42 (Thomas, J., concurring).

7. Despite the short-lived racial preference this Court affirmed in *Paradise*,[4] Respondent contends that there is "nothing remarkable about the affirmative action plans . . . here, even in terms of duration." Brf. in Opp. at 18-19. This statement alone should be reason enough to grant the writ, considering that racial preferences in promotions in the CFD have now been in effect for nearly 15 years. Moreover, despite Respondent's argument to the contrary, other circuits have not approved the type of preferential affirmative action programs that have lasted anywhere near as long as in the Chicago Fire Department. In *Majeske v. City of Chicago*, 218

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[4] Not only is *Paradise* the one and only occasion where the Court has let stand a racial preference as an affirmative action measure in the public sector, but Justice O'Connor's decision in *Croson* suggests that the pervasive and obstinate discriminatory conduct confronted in *Paradise* – where Justice O'Connor dissented to the use of racial preferences – would no longer be an acceptable justification for the use of racial preferences: either because *Paradise* was not an "extreme case," or because the other remedial steps in *Paradise*—especially the development of non-discriminatory promotional exams—sufficed "to break down patterns of deliberate exclusion." *Croson*, 488 U.S. at 509.

F.3d 816, 823-34 (7th Cir. 2000), the racial preferences in the Chicago Police Department were narrowly tailored because they were used for "one detective promotion" in 1990. In *Boston Police Superior Officers Fed v. City of Boston*, 147 F.3d 13, 23-25 (1st Cir. 1998), the affirmative action was "limited strictly to [a] single promotion," and the court took pains to point out that the Boston Police Department could not "depart from strict rank order in future promotions." *See also,* Petition at pp. 15-17.

8. Respondent's assurance that its preferential promotional policy will cease when "the consequences of the past discrimination have substantially dissipated," Brf. in Opp. at 19, is no more reliable than Respondent's promise in 1987 that affirmative action promotions to the rank of engineer would cease by 1990. Petition at pp. 6-7. Furthermore, in terms of duration, Respondent does not have a clue—and certainly does not venture a guess—when the time will come when past discrimination will have "substantially dissipated." Respondent now takes issue with its own expert's testimony on the question of duration—but for the wrong reason. Brf. in Opp. at p. 20 n. 5. Respondent points out that the prediction of Dr. Suchanek, that "closure"[5] would be reached 10 to 15 years hence—2010 to 2015—was "predicated on a number of assumptions." *Id.* Predictions are only as good as the underlying assumptions, and proportional hiring, the central assumption of the prediction that closure will occur in 2010 to 2015, has no basis in reality.

9. Instead of proportional hiring (57%), minority hiring reached its peak at 41% in the mid 1980s and has been dropping ever since. Petition at pp. 8-10, 19-21. The court of

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[5] By "closure" Dr. Suchanek was referring to that point in time when the minority composition of the CFD would be in proportion to the racial make-up of Chicago, and this census based proportional hire model was the key assumption used by Dr. Suchanek is giving the 10-15 year time frame. Tr. 2290-91; Pet. App. 136a-138a.

appeals, however, accepted the proportional hiring model as its benchmark for determining when past discrimination will have substantially dissipated. Pet. App. 6a. Since that benchmark is illusory, then we agree with Respondent that fixing the stopping point of 2010 or 2015 is "inaccurate"—if anything that time frame is an optimistic estimate. *See, U.S. v. City of Chicago,* 663 F.2d 1354, 1361(7th Cir. 1981) ("it puts the cart before the horse to maintain a high and inflexible quota for minority promotions while minority hiring proceeds under non-discriminatory procedures . . . at a much lower rate.").

CONCLUSION

For the foregoing reasons, and those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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